**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**
**CRIMINAL WRIT PETITION NO.1227 OF 2006**

Shri Prakash Mahadev Kshirsagar ...Petitioner

Vs.

Sau.Sudha @ Padma Prakash Kshirsagar
& Ors. ...Respondents

Shri S.S. Kulkarni for the Petitioner.
Ms Prabhu for Shri N.V.Bandivadekar for the Respondent No.1.
Shri S.R. Shinde, A.P.P. for the State.

**CORAM : A. S. OKA, J.**
**DATE : AUGUST 30, 2006.**

**P.C.:**

1. Rule. The Advocates appearing for the Respondents waive service. Taken up for hearing forthwith.

2. The first Respondent made an Application under section 125 of the Code of Criminal Procedure, 1973 against the Petitioner for grant of maintenance. The first Respondent claimed that she married to the Petitioner on 24th May, 1983. The Petitioner filed written statement and contested the said Application. It was contended by the Petitioner that the first Respondent was not his legally wedded wife and infact one Anjana @ Sudha is the lawfully wedded wife of the Petitioner. It was his contention that the Petitioner

married to the said Anjana @ Sudha on 29th April, 1979 and there are two issues born to the said Anjana @ Sudha. However, the Petitioner did not dispute that he had a relationship with the first Respondent and out of the relationship a son has been born to the first Respondent.

3. The learned Judicial Magistrate, First Class by his order dated 27th May, 2005 allowed the Application filed by the first Respondent and directed the Petitioner to pay maintenance of Rs.1,000/- per month from the date of Application. The Petitioner applied under section 126 of the said Code before the learned Magistrate for setting aside the order dated 27th May, 2005. One of the reasons set out in the said Application was that the Advocate appointed by the Petitioner was preparing herself for the examination to be conducted for appointment to the posts of Judicial Magistrate First Class and therefore, the said Advocate did not contest the Application filed by the first Respondent. The said Application was contested by the first Respondent. On the basis of order passed below Exhibit 14, the learned Judicial Magistrate First Class allowed the said Application preferred by the Petitioner and restored the original Application for

maintenance filed by the first Respondent. By order passed below Exhibit 14 the learned Magistrate has allowed the Petitioner to deposit Rs.10,000/- under protest towards the maintenance.

4. The order of restoration passed by the learned Magistrate was challenged by the first Respondent by filing a Revision Application. By order dated 06th May, 2006 which is impugned in this Petition, the learned Additional Sessions Judge, Karad allowed the Criminal Revision Application and directed that the learned Magistrate should decide the Application for restoration made by the Petitioner afresh.

5. The learned Advocate appearing for the Petitioner submitted that infact the Application for restoration was allowed on the basis of implicit consent of the first Respondent. He submitted that there was no reason for the Revisional Court to interfere with the discretionary order passed by the learned Magistrate of restoring the Application filed by the first Respondent. He submitted that a sum of Rs.10,000/- was deposited by the Petitioner under protest and therefore, the learned Additional Sessions Judge ought not to have permitted the first Respondent to withdraw

the said amount. The learned counsel for the first Respondent submitted that infact there was no consent granted by the first Respondent for restoration of original Application and that is the reason why the Revisional Court has set aside the order of restoration and has directed to Trial Court to decide the Application afresh after giving an opportunity to both the parties to lead evidence.

6. I have carefully considered the submissions. The perusal of the order dated 27th May, 2005 passed by the learned Magistrate shows that the Petitioner entered the witness box on 03rd August, 2004 and his cross-examination was partly completed on 09th March, 2005. The learned Judge noted that thereafter the Petitioner and his Advocate consistently remained absent and therefore, the Application was kept for final arguments and was decided. The learned Magistrate has drawn adverse inference against the Petitioner for not entering the witness box for completion of cross-examination. If this is the factual position, there was some justification for setting aside the said order with a view to give an opportunity to the Petitioner to re-enter the witness box. The course adopted by the Revisional Court is of

remanding the Application for restoration for re-hearing. By following the said course, it is quite possible that the first Respondent-wife may be the ultimate sufferer as it is in her interest that the proceeding under section 125 of the said Code is finally disposed of at the earliest.

7. Considering the facts of the case, the direction given by the Sessions Court of setting aside order dated 30th August, 2005 will have to be set aside and the said order dated 30th August, 2005 will have to be restored. However, the first Respondent will have to be protected. Considering the stand taken by the Petitioner in his written statement, the direction issued on 27th May, 2005 to pay maintenance of Rs.1,000/- per month will have to be treated as an interim order which will operate till the disposal of the Application under section 125 of the said Code. The Sessions Court was right in allowing the first Respondent to withdraw the sum of Rs.10,000/- as the said withdrawal will be obviously without prejudice to the rights and contentions of the parties in the Application under section 125 of the said Code. Shri Kulkarni appearing for the Petitioner states that at the rate of Rs.1,000/- per month the arrears are to the

tune of Rs.29,000/-. He stated that without prejudice to the rights and contentions of the parties and under protest the Petitioner is ready and willing to deposit the upto date arrears in the Trial Court if sufficient time is granted. he stated that the said amount may not be allowed to be withdrawn by the first Respondent.

8. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 06th May, 2006 is quashed and set aside and Revision Application filed by the first Respondent stands dismissed.

(ii) The order dated 30th August, 2005 passed in Criminal Misc. Application No.419 of 2005 is restored.

(iii) The parties are directed to appear before the learned Judicial Magistrate First Class at Karad on 26th September, 2006. The Petitioner will enter the witness box and will offer himself for further cross-examination by the Advocate appearing for the first Respondent. The Petitioner will be free to lead further evidence

by examining any other witnesses. It will be open for the first Respondent to lead additional evidence.

(iv) Direction given on 27th May, 2005 to pay monthly maintenance of Rs.01,000/- will continue to operate as an interim order till the final disposal of Application under section 125 of the said Code filed by the first Respondent.

(v) Time of three months is granted to the Petitioner to deposit the amount of arrears upto date in the Trial Court. If the said amount is deposited, the Trial Court will invest the same in fixed deposit in any nationalised Bank for a period of nine months. The Order regarding disbursement/withdrawal of the amount with interest accrued thereon will be passed by the learned Magistrate at the time of final disposal of the Application. For a period of three months from today, the warrant issued against the Petitioner shall not be executed. If the Petitioner fails to deposit the amount within the stipulated time of three months, warrant will become executable.

(vi) The Petitioner will continue to pay a sum of Rs.01,000/- per month from September 2006 to the first Respondent as stated in clause (iv) above. The payment of the said amount will be obviously subject to final outcome of the pending Application under section 125 of the said Code. The first Respondent will be also entitled to withdraw a sum of Rs.10,000/- deposited by the Petitioner in the Trial Court on 23rd August, 2005.

(vii) The Application under section 125 of the said Code filed by the first Respondent shall be disposed of by learned Trial Judge as expeditiously as possible and preferably on or before 31st March, 2007.

(viii) Rule is made partly absolute in above terms with no orders as to costs.

(ix) Writ of this order be sent to the Trial Court forthwith.

**JUDGE**